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In the Supreme Court of the United States

OCTOBER TERM, 1959

ST. JOHNS MOTOR EXPRESS CO., *Appellant*,
and
CONSOLIDATED FREIGHTWAYS, INC., and JAMES J. WILLIAMS, INC., *Intervening Appellants*,
vs.
UNITED STATES OF AMERICA, *Appellee*,
and
INTERSTATE COMMERCE COMMISSION, EVERTS' COMMERCIAL TRANSPORT, INC., and INLAND PETROLEUM TRANSPORTATION COMPANY, INC., *Intervening Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

ALBERT E. STEPHAN
Attorney for Intervening Appellee, Inland Petroleum Transportation Company, Inc.

Of Counsel:
GROSSCUP, AMBLER, STEPHAN & MILLER
711 Central Building, Seattle 4, Washington

NOLAN HART,
HART, DAVIDSON & YEAZIE
Equitable Building, Portland 4, Oregon

September, 1959.

THE ARGUS PRESS SEATTLE

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ALLAN HART,
HART, DAVIDSON & VEAZIE
Equitable Building, Portland 4, Oregon

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(e) of the Revised Rules of this Court, this intervening appellee, Inland Petroleum Transportation Company (INLAND), moves that the judgment of the district court be affirmed on the ground that the questions presented are so insubstantial as not to need further argument.

STATEMENT[1]

This is a direct appeal from the judgment of a three-

[1] To conserve the time of this Court and to avoid needless duplication, INLAND adopts by reference the Government's Motion to Affirm and its excellent detailed Statement and Argument.

judge District Court (Juris. St. 15) dismissing appellants' complaint and sustaining the Report and Order on Reconsideration by the entire membership of the Interstate Commerce Commission, hereinafter termed "Commission," in *Docket No. MC 2564* (Sub No. 36 *et al.*, *Everts' Commercial Transport Inc., Extension*, decided January 19, 1959, 78 MCC 717 (Juris. St. 1).

That Report on Reconsideration had in turn affirmed the report by a Division of the Commission, decided September 10, 1957, 72 MCC 599.

The action was brought by appellant, St. John Motor Express (ST. JOHNS), one of several competitive motor common carriers of liquid chemicals in tank trucks. Appellees, INLAND and Everts Commercial Transport (EVERTS), are two such competitors. The two intervening appellants, J. J. Williams, Inc. (WILLIAMS) and Consolidated Freightways, Inc. (CONSOLIDATED), are also two other such competitors (Juris. St. 5).

All five of these motor common carriers have for many years operated under respective certificates of convenience and necessity issued by the Commission authorizing transportation by tank truck of specified liquid commodities in various designated areas of the western states. See 78 MCC 717, *supra*, as to respectively, INLAND at 726; EVERTS at 721; ST. JOHNS at 723; WILLIAMS at 724; and CONSOLIDATED at 724-5.

In late 1955 and early 1956, intervening appellees, INLAND, EVERTS and eight other motor carriers, including intervening appellant, CONSOLIDATED, had separately applied to the Commission for certificates to ex-

pand their respective rights to transport liquid chemicals in various defined territories. 78 MCC at 718-19, 771-6. These applications, including that of intervening appellant, CONSOLIDATED, were opposed by ST. JOHNS and other carriers. 78 MCC at 771-4, Appendix A. In some instances these applications were heard *seriatim* by one examiner on separate records, in others on a consolidated record by another examiner, and in still others, consecutively and separately, by other examiners. These various examiners submitted divergent recommended reports. 72 MCC at 601-5; 78 MCC at 718.

After exceptions and replies had been filed with the Commission in the several proceedings by the various supporting and opposing rail and motor carriers, a Division of the Commission disposed of all of these then pending applications to transport chemicals in the western states by one combined Report which made separate findings and conclusions as to the extent of public convenience and necessity proved by each applicant, and it authorized appropriate certificates. 72 MCC 599, 605-620.

Then various opposing carriers asked for reconsideration by the entire Commission. This was granted. 78 MCC 717, 718. After a detailed review of the record in each of these related proceedings, a majority of the entire Commission reaffirmed the Division's grant of new rights to appellees, INLAND and EVERTS. 78 MCC 720-731; it reversed an Examiner's report which had recommended denial of any further authority to CONSOLIDATED and instead granted CONSOLIDATED certain additional rights. 78 MCC at 719, 750-764; and as to other

applicants, it either reaffirmed or modified the Division's report as it found appropriate under the varying factual situations. 78 MCC 718, 731-750.

The voluminous testimony and exhibits in INLAND and in EVERTS before the Commission were introduced in evidence in the District Court and are among the papers designated by appellants on this appeal. (Appellants' Notice of Appeal, Item 10). In INLAND the transcript comprised 1,278 pages of evidence and 76 exhibits. In EVERTS they comprise 555 pages of testimony and 42 exhibits (Notice of Appeal, Item 10). The Division's Report and supporting appendices comprised 23 printed pages, 72 MCC 599; and the Commission's Report on Reconsideration, 78 MCC 717, comprises 50 printed pages including its attached appendices.

Both Reports recognize the expanding requirements of recent years in the western states for additional motor carrier services in transporting liquid chemicals because of the great increase in use of chemicals by agriculture, industry and commerce, *e.g.*, 72 MCC at 610, 615, 616; 78 MCC at 719-20, 726-31, 761-65, and *passim*.

The complaint by ST. JOHNS, and that of WILLIAMS and CONSOLIDATED, seek only to set aside the grant to INLAND and EVERTS (Juri. St. 4-5). ST. JOHNS did not attack the grant to CONSOLIDATED, or that to the several other carriers, except INLAND and EVERTS, although ST. JOHNS had opposed CONSOLIDATED and most of the other applicants in the proceedings before the Commission, 78 MCC at 771-3. Obviously CONSOLIDATED did

not complain to the District Court of the new grant to itself although it also had opposed grants to others, 72 MCC at 620-2. Hence under this strategy, ST. JOHNS will continue to enjoy its "broad authority," 78 MCC at 723, and CONSOLIDATED would continue to benefit by the new rights conferred by the Commission on it; and, if the three-judge District Court judgment were reversed, all the other newly authorized competitors would also enjoy their newly authorized rights, except appellees, INLAND and EVERTS, against whom this entire attack is leveled.

Each legal issue raised by appellants' pleadings before the District Court had been previously considered by the Commission, in the phraseology as *then* presented, see Argument, *infra*, p. 9; or was based on well-established precedents of this Court. The District Court disposed of all of these issues in two successive opinions, first, on March 10, 1959 by the Chief Judge of the District of Oregon denying ST. JOHNS' application for a temporary injunction, and later, on April 27, 1959 by the three-judge Court dismissing the action on the merits.

Appellants elected to print only the latter April opinion as their Appendix A (Juris. St. 15-16), and they omitted the District Court's "earlier opinion in the same case." Cf. USSC Rule 15(1)(h). Since that opinion had carefully considered each of the contentions now raised by Appellants' Jurisdictional Statement, as well as by their Notice of Appeal, and is not

otherwise readily available, it appears seemly for appellees to print its full text, as follows:

> "THE COURT (SOLOMON, C. J., District of Oregon): Yesterday (March 9, 1959) I announced that I was satisfied that on the showing made plaintiff was not entitled to a temporary restraining order or a temporary injunction on the basis that the Commission decided the Everts and Inland Petroleum Transportation cases on evidence introduced in eight other cases.
>
> [a] "It appeared clear from the Order of the Commission that *the Commission considered the evidence* adduced *in each case separately*. Of course, the Commission should consider general trends as shown by all of the cases, but certainly the Commission cannot blind itself to what is happening in the chemical field.
>
> [b] "I *also* stated that in my view *there was no merit in the contention that the order was based on mere possibilities*. The order contained a recital of evidence indicating the actual construction of some plants and the assurances given that other plants were to be constructed in the near future. I think that *the Commission would have been derelict in its duty to wait until the plants had actually been constructed* in order to grant licenses. This is *particularly* true *in view of the fact* that *the hearing* in this case *took place in 1956*, and *here it is 1959 and the certificates have not yet been issued*.
>
> [c] "*I do not agree with the* plaintiff's *interpretation of the statements* made in the order *that the service*

[2] Bracketed letters supplied therein to correspond to separate contentions of appellants in the court below. Emphasis supplied herein unless otherwise shown.

was adequate. Plaintiff has taken one or two statements out of context in order to support such statement, *but these* statements *are in direct conflict with* the holding of the Commission and with *the evidence upon which the holding was made.*

[d] "It is obvious *from an examination of the evidence* reviewed by the Commission that *the service rendered by St. Johns will be actually inadequate* with the construction of the new plants *and* that the situation *will not be relieved by other types of transportation presently available.*

"In considering the advantages and disadvantages which would result from the granting or withholding of temporary injunctive relief, I have come to the conclusion that the losses to be suffered by the intervening defendants if an injunction were granted would greatly exceed the disadvantages to be suffered by the plaintiff in the event that the certificates were issued by the Interstate Commerce Commission.

[e] "Yesterday I reserved the point made by the plaintiff that the Commission did not consider the National Transportation Policy. I was in doubt as to whether the statement in the order that the Commission constantly kept in mind its responsibilities under the National Transportation Policy was adequate or that its statement that a specific finding was neither necessary nor appropriate was correct. While I am not in full agreement with the statement in the order; and even though I think it would have been much better practice for the Commission to have made specific findings, *a reading of the Commission's order affirmatively shows that the Commission did in fact consider the National Transportation Policy.*

> "Under the authority of *Luckenbach v. United States*, 122 F.Supp. 824, which was *affirmed, per curiam* by the Supreme Court of the United States in 347 U.S. 984, *I believe that to be sufficient.*
>
> "I therefore find that the plaintiff has failed to make an adequate showing on any ground for the issuance of a temporary restraining order or an injunction, and its application for such order is therefore denied."[3]

Subsequently, separate and extensive briefs were submitted to the District Court on behalf of appellants, ST. JOHNS and of WILLIAMS CONSOLIDATED, and by appellees, United States ICC, and by INLAND and by EVERTS. The matter was then fully heard on the merits before the three-judge District Court (Juris. St. 2-15-16).

After trial on the merits, the three-judge Court confirmed and adopted as the finding of that Court all of the Commission's findings of fact and conclusions of law, and thereupon dismissed the action (Juris. St., Appendix A, p. 16).

[3] Quoted in full text from Clerk's Certificate to this Court pursuant to Designation of Record in Appellants' Notice of Appeal, Item 6.

[4] Appellants' Notice of Appeal (Items 5, 8 and 9) designated that the transcripts of all oral arguments in the court below be transmitted to this Court. Appellees are advised the Clerk of the District Court has complied. Accordingly, since these transcripts are now before this Court, and since the three-judge court considered, on oral arguments, each contention now raised on appeal, the Argument section of this Motion to Affirm will cite appropriate transcript references thereto.

ARGUMENT

I.

A. Since ST. JOHNS' first contention as to the scope of the National Transportation Policy is the prime issue raised on this appeal, this brief is addressed chiefly to it. ST. JOHNS' contention is essentially one of semantics made manifest by its shifting statements of this contention before the Commission, the District Court, and this Court. It now asks this Court:

> "1. Must the Interstate Commerce Commission consider, give weight to, *make findings* and discuss the National Transportation Policy, *in public convenience and necessity proceedings*, with respect to *whether* the proposed *additional operating authorities*, upon the evidence of record in each proceeding, *would impair* the ability to (*sic*) existing carriers to maintain *a safe, adequate, economical and efficient service?*" (Juris. St. 3)

B. It had made a significantly differently phrased contention before the Commission in its Petition for Reconsideration. Cf. *United States v. Tucker Truck Line*, 344 U.S. 33, 36-7 (1952). The Commission's final decision, 78 MCC 717 at 764-5, reported:

> "One other matter warrants discussion here. *St. Johns asserts that it is error to grant common-carrier authority without a specific finding that the grant is consistent with the public interest and the national transportation policy.* Such a finding is appropriate only in granting motor contract carrier authority. If a proceeding involving a motor-carrier application for authority to provide service between points served exclusively by rail, the standards of the national transportation policy

must be correctly applied (*Schaffer Transp. Co. v. United States*, 355 U.S. 83), but in no proceeding involving common-carrier authority by motor vehicle is there a specific finding such as suggested by St. Johns necessary or appropriate. We have, of course, constantly kept in mind our responsibilities under the national transportation policy. It goes without saying that the purpose of the policy must be considered in all proceedings of the character here presented."

(1) Clearly the answer to appellants' "question presented," as now phrased (Juris. St. 3) is that the Commission did (1) "*consider*" and (2) "*give weight to*" and (3) "*discuss*" the National Transportation Policy. 78 MCC at 764-5. The Commission did not (4) make the requested "*finding*" (Juris. St. 3). Instead, it carefully explained that in granting *common* carrier authority (*i.e.* in "public convenience and necessity proceedings") the statute does not provide for:

> "a specific *finding* that the grant is consistent with the public interest and the National Transportation Policy." 78 MCC at 764.

The Commission pointed out that such a specific *finding* is only applicable to *contract* carriers. Cf. 49 USCA §307(a) and §309(b). 78 MCC at 764.

(2) Nor had St. Johns' complaint before the District Court gone so far. It then only alleged the Commission had erred in failing:

> "to *consider or* make *any* findings with respect to the National Transportation Policy"

and that the Commission had erred in holding that:

> "findings with respect to the National Transpo

tation Policy were only necessary in cases involving CONTRACT CARRIER APPLICATIONS."[15]

(3) Similarly, intervening appellants, Williams and Consolidated, alleged in the District Court only that:

"* * * the Commission exceeded its statutory powers relating to the issuance of certificates of public convenience and necessity as set forth in the National Transportation Policy and Section 307, Title 49, U.S.C.A."[16]

(4) As heretofore noted, the District Court, on application for temporary restraining order, held:

"* * * a reading of the Commission's order affirmatively shows that the Commission did in fact *consider* the National Transportation Policy.

"Under the authority of *Luckenbach v. United States*, 122 Federal Supp. 824, which was affirmed *per curiam* by the Supreme Court of the United States in 347 U.S. 984, *I believe that to be sufficient.* * * *"

(5) St. Johns' complaint before the District Court, in alleging a violation of the National Transportation Policy, had cited two District Court cases,[3] *Pacific Inland Tariff Bureau v. U. S.* (D.C. Ore. 1955) 129 F. Supp. 172, and *Cantlay & Tazzola v. U.S.* (D.C. Calif. 1953) 115 F.Supp. 72. These two cited opinions had been written, respectively, by two of the three members of the instant three-judge court: Hon. Gus J. Solomon,

[15] Emphasis in St. Johns' Bill for an Injunction. (Appellants' Notice of Appeal, Item 1, p. 5 (sic) 62, lines 23 to 24.)

[16] Cross Designation by Defendants of Additional Portions of Record to be Certified on Appeal, Item 5, p. 1, lines 26 to 30.

[3] See Notice of Appeal, Item 1, Petition and Bill for Injunction, p. 5 (sic, 62) lines 26-30.

Chief Judge, of Oregon, and Hon. William C. Mathes, District Judge, of California. Hence the constituted Court had previously become thoroughly familiar with these cases and with the broad issue, and it was again elaborately briefed and argued." The two cited cases relate to "rate wars" and not to certificates of public convenience and necessity. The *Cantlay & Tanzola* case had been distinguished by Judge Hand in the *Luckenbach* certificate of convenience and necessity case cited in the trial court's opinion, *supra*, 122 F.Supp. 824, aff'd *per curiam*, 347 U.S. 984. The members of the three-judge court, on oral argument recognized these legal differences[9] and in their final opinion they rejected ST. JOHNS' contention and adopted the Commission's report, stating:

> "Accordingly the findings of fact and conclusions of law set forth in the report of the Commission (78 MCC 717) * * * are hereby confirmed and adopted as the findings of the court, * * * ". (Juris. St. p. 16)

C. In the Court below, as here, the Government's Argument supporting its Motion to Affirm makes a scholarly analysis of all reported cases on the relation of the National Transportation Policy to the Commission's administration of its many duties. INLAND adopts by reference that analysis, and confines its argument to the *statutory* evolution, which it submits is in harmony with the *decisional* evolution.

[8] Appellants' Notice of Appeal, Item 9, Transcript Apr. 27, 1959, p. 6 *ff passim*.

[9] App. Notice of Appeal, Item 9, Transcript Apr. 27, 1959, *e.g.*, pp. 7, 15-16, 17-19, 20, 50-56.

(1) Inland believes that in determining the scope of the National Transportation Policy, it is helpful to review the historical evolution of the applicable statutes.

(2) The term "public convenience and necessity" is nowhere defined in federal legislation, yet it has been the sole yardstick for the Commission for more than thirty years.[9] It has had extensive administrative and judicial construction. In *I.C.C. v. Parker*, 326 U.S. 60, 65 (1945) this Court held:

> "Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from the *half-century experience* of government in the regulation of transportation. When *Congress* in 1935 amended the Interstate Commerce Act by *adding the Motor Carrier Act*, it *chose the same words* to state the condition for new motor lines which had been employed for similar purposes for railroads in the same Act since * * * 1920 * * *. *Such use indicated a continuation in the administrative and judicial interpretation of the language.*"

The statutory prerequisite of a finding of "present or future public convenience and necessity" is still the *sole* finding required by Congress for issuance of *certificates of public convenience and necessity* authorizing operations of *common* carriers, whether by railroad, 49 USCA §1 (18-20); or by motor, 49 USCA §307; or by water, 49 USCA §909(d).

[9] 49 USCA §1(18)ff (1920), applying to railroads. Year in and year out the Commission uses this same standard to determine thousands of motor common carrier applications for certificate of convenience and necessity, *cf.*, Volumes 1 to 73, Motor Carrier Cases and 72d An. Rep. ICC (1958) p. 43.

(3) Originally most regulated transportation was by *railroad* and virtually all railroads were *common* carriers; hence there was no legislative occasion to distinguish the statutory criteria applicable to common vs. contract carriers.

(4) This statutory standard is in sharp contrast to that applicable to *permits* authorizing operation by *contract* carriers.

(5) When Congress determined to regulate motor carriers in the 1930's the successive House and Senate bills recognized the then very current legal distinctions that had been drawn between power to regulate *common* carriers and that to regulate *contract* carriers. Cf. *Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583 (1926); *Smith v. Cahoon*, 283 U.S. 553 (1931) and *Stephenson v. Binford*, 287 U.S. 251 (1932); *Coordination of Motor Transportation*, 182 ICC 263, 381-2, and cases cited at note 77 (1932).

(6) Accordingly when Congress enacted the Motor Carrier Act, 1935, it made a clear-cut distinction between the legislative requirements for grants of *certificates* to *common* carriers and *permits* to *contract* carriers. 49 USCA §§307 and 309. It required for both types proof that the applicant be "fit, willing and able", but the yardstick of proof for granting a *certificate* to a *common* carrier continued to be solely the historical and judicially construed, requirement of "public convenience and necessity." The new yardstick created for granting a permit to a contract carrier was proof and a "finding" that it is:

[a] "Consistent with the public interest, and [b] "the National Transportation Policy." (49 USCA §309(b)).

These identical legislative distinctions between the standards of proof and required findings for common carrier certificates and for contract carrier permits are similarly preserved in the regulation of water carriers. Cf. 49 USCA §909(c) and (g).

(7) Congress, in carefully drafting the Transportation Act of 1940, prefaced it with a declaration of the National Transportation Policy and listed many factors to be *considered* by the Commission in performing its various complex duties. In its closing sentence, it provides broadly that:

"'*All* of the *provisions* of this Act *shall be administered* and enforced with a view to carrying out the above declaration of policy.'" 49 USCA, note preceding §1.

The new yardstick as originally enacted for *contract carriers* was proof that it was [a] "consistent with the public interest and [b] *the declaration of policy of the* 'Motor Carrier' *Act* of 1935". Public Law No. 255, 74th Cong. Sec. 202(a); 49 Stat. 543.

When the National Transportation Policy was formulated in the 1940 Act, the new Act was changed at every place where there had been reference to the "declaration of policy" of Part II of the said Motor Carrier Act, 1935; and, instead, the 1940 Act substituted the words "*National Transportation Policy*." Public Law No. 785, 76th Cong. Sec. 16; 54 Stat. 913, (1940).

McLean Trucking Co. v. U. S., 321 U.S. 67, at 82, traced the evolution of the Motor Carrier Act and said:

"In 1935 it enacted a comprehensive scheme of regulation for motor carriers. * * * The policy which was to guide the Commission in administering that Act was fully stated" [fn. 16 quotes its text which includes many of the identical words used in the national transportation policy including to 'promote adequate economical and efficient service by motor carriers'] and has since been absorbed into the equally full statement of the national transportation policy."

(8) The 1940 Act then carefully designated certain specific tasks in addition to contract carrier permits in which it specifically required the Commission to make "*findings*" as to conformity with the National Transportation Policy. For example, [a] Agreements that would otherwise violate anti-trust laws, 49 USCA §5a(2); [b] exemptions of water carriers engaged in harbor operations, 49 USCA §903(g); [c] exemption of motor carrier providing interstate services to and from airports, 49 USCA §303(b)(7a); [d] dual operations as a common and contract carrier by motor, 49 USCA §310; or by water, 49 USCA §910; [e] operation as a broker of motor carrier service, 49 USCA §211(b); [f] relief from requirements that *contract* carriers publish and file minimum reasonable rates, 49 USCA §318(a); and [g] compare other parallel provisions in the Water Carrier title, Part III, and in the Freight Forwarder Title, Part IV, of the Act, 49 USCA §901, ff., 49 USCA §1001 ff.

(9) Against this background we re-read the applicable portions of the Commission's Report, which states that:

> "St. Johns asserts that it is error to grant *common* carrier authority without a *specific* finding that the grant is consistent with the public interest and the National Transportation Policy." (78 MCC at 764)

Instead the Commission held that:

> "Such a *finding* is appropriate only in granting a motor *contract* carrier authority." (78 MCC at 764)

(10) It is respectfully submitted that this is an accu-

rate statement of the law. The "*finding*" which ST. JOHNS urges is *not* required or authorized by law for *certificates* for *common* carriers. In granting certificates of public convenience and necessity for common carriers, all that the law and court decisions require is that the Commission find "public convenience and necessity"; and that its report be sufficiently clear so that this Court may verify that Commission action "*comports*" with the National Transportation Policy. *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 92 (1957), *infra*.

(11) In view of this clear and careful legislative distinction, ST. JOHNS is patently in error in demanding that the Commission make a finding of conformance with the National Transportation Policy in issuing a common carrier certificate under §307.

C. Continuing, the Commission's report, 78 MCC 761-5, analyzes this Court's decision in *Schaffer Transp. Co., supra*.

(1) An order of the Commission had *denied* a certificate to a motor common carrier to transport granite funeral blocks solely on the basis of opposition by competing railroads. There were no existing motor carriers to transport this granite. This Court held the Commission, in denying any motor carrier certificate, had failed to *consider* the "comparative advantages" to the public of motor carrier service as well as of rail carrier service, and therefore was unlawful because the Commission's Report and Order did not;

"* * * provide this Court with a basis for deter-

mining whether the Commission's decision *comports* with the National Transportation Policy * * *." 355 U.S. at 92.

An appropriate definition of the verb "to comport" is:

"2. To agree; accord, or suit (with):" Webster's New International Dictionary (2nd Ed. 1946).

(2) There is no such problem in the instant proceedings. No rail carrier has challenged the Commission's order; the record and both reports of the Commission abound with references to the "comparative advantages" of rail and motor carriers in serving consumers and manufacturers of liquid chemicals; *e.g.* 72 MCC 599, 615; 78 MCC 717, 722, 729, 761. Therefore the Commission held at 78 MCC 764-5:

"* * *In a proceeding involving a motor-carrier application for authority to provide service between points served exclusively by rail, the standards of the national transportation policy must be correctly applied (*Schaffer Transp. Co. v. United States*, 355 U.S. 83), but in no proceeding involving common-carrier authority by motor vehicle is there a specific finding such as suggested by St. Johns necessary or appropriate."

D. Finally, the Commission held that:

"It goes without saying that the *purposes* of (the National Transportation Policy) must be *considered* in all proceedings of the character here presented." 78 MCC at 765.

and the Commission reported that:

"We have, of course, constantly kept in mind

our responsibilities under the National Transportation Policy." 78 MCC at 765.

(1) This is precisely what the Act contemplates. Thus, it is very clear, from the Commission's careful appraisal of the advantages and disadvantages of rail services, and of existing motor carrier services, and of shipper requirements for additional motor carrier facilities in varying segments of the West, that the Commission's Report fulfilled all requirements of law and clearly provides this Court with the required basis for determining that the Commission's decision does "comport" with the National Transportation Policy; and therefore it is respectfully submitted that the Commission's report fully complies with this Court's decision in *Schaffer Transp. Co. v. U.S.*, *supra*, 355 U.S. 83, 92 (1957). Cf, *Luckenbach SS Co. v. U.S.*, 122 F.Supp. 824; aff'd 347 U.S. 984 (1954); *ICC v. Balt. O. R. Co.*, 355 U.S. 175, 178 (1957).

(2) It follows that neither the language of the 1940 Declaration of Policy, nor the *Schaffer* case in construing this policy in any way supports St. Johns' contentions in this case.

II.

A. Appellants next contend that the Commission predicated its Findings and Conclusions upon evidence not of record in the subject proceeding. From this false premise appellants leap to the conclusion of violation of due process.

(1) The premise is false because every single phrase, clause and sentence of the Commission's decision grant-

ing certificates to INLAND and to EVERTS is carefully supported by transcript reference to the 18 shipper witnesses who supported INLAND as well as to those who supported EVERTS.

This was copiously referred to in the oral argument before the trial court, the transcript of which the appellants have designated to be certified on appeal (Notice of Appeal, Item 10, Record of Proceedings and Exhibits before ICC in INLAND and EVERTS, Item 9, Transcripts of Oral Arguments before District Court, April 27, 1959, pp. 30-31, 36-37, 48, 66, 72, 74-75.)

(2) The conclusion is also false because, as the Government's Motion to Affirm quotes, there are no less than four passages in the Commission's final report showing that it considered the evidence of record as to each application separately (78 MCC 717 at 720, 761, 762).

(3) As the Commission emphasized, its Final Report discussed—

> "* * * the evidence presented in each proceeding by the applicant and opposing carriers either separately or together in properly related cases, and follow such discussion by evidentiary findings with respect to the need shown for additional motor carrier service in the light of the shipper testimony and the existing transportation facilities." (78 MCC at 720)

Thus, it is crystal clear that the Commission scrupulously sought to consider each of the ten companion applications on its respective merits.

B. Even assuming, *arguendo*, that the Commission

"in the final stage of forming its judgment"

took broad cognizance of the tremendous increases in production and distribution of chemicals in the West as portrayed in each of the various companion cases, this is not error. In *U.S. v. Pierce Auto Lines*, 327 U.S. 515, 529 (1945) this Court said:

> "In the absence of any showing of specific prejudice, the claim comes down to the highly technical objection that the Commission, *in the final stage of forming its judgment*, could not in either case take count of what had been done in the other, notwithstanding the closely related character and objects of the applications and the prior proceedings. * * * Obviously *it would be consistent neither with good sense nor*, we think, with the type of hearing assured by the *statute* to force the Commission *to put on such complete blinders* * * *. And, given that the report contains all the essential findings required, (citing case) the Commission is not compelled to annotate to each finding the evidence supporting it."

III.

A. Next appellants claim in effect that the Commission had "changed the rules of the game" during the half. This charge appears baseless. In oral argument it was pointed out, that the very counsel for intervening appellant, CONSOLIDATED, who urged this contention, had himself also appeared in these very proceedings on behalf of still another applicant, Pacific Inter-Mountain Express (ICC Docket No. MC 730 Sub 60). See 72 MCC at 599, 611 ff; 78 MCC 717 at 743 ff. In such ca-

pacity he cited many 10C reports enunciating the very rules for multiple grants that appellants now allege to be new rules. (See Notice of Appeal, Item 9, Transcript of April 27, 1959, pp. 67-68, 69, 70-71, 88).

B. The Commission, like the Courts, recognize that each case must be judged on its own merits. There is no guarantee of a continuous monopoly based solely on broad claims of lack of full use of existing carriers and regardless of shipper needs for improved service. That is what appellant urges was the old rule of the game. No such rule exists.

IV.

The last question raised by appellant seems almost rhetorical. It is obvious that the Commission cannot make Findings or Conclusions not supported by substantial evidence. The record is before the Court. Aid in reading the report was abundantly furnished by the government's annotations to transcript references in the Court below,[12] implementing each and every finding with transcript references to the record. This contention, like the others, is utterly without merit.

[12] *Supra*, pp. 19-20.

CONCLUSION

It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument (USSC Rule 16(1)(c)); and therefore the judgment of the District Court should be affirmed.

Respectfully submitted,

ALBERT E. STEPHAN

Counsel for Intervening Appellee, Inland Petroleum Transportation Company, Inc.

Of Counsel,

GROSSCUP, AMBLER, STEPHAN & MILLER
711 Central Building, Seattle 4, Washington

ALLAN HART,
HART, DAVIDSON & VEAZIE
Equitable Building, Portland 4, Oregon

Dated at Seattle, Washington, this
14th day of September, 1959.

CERTIFICATE OF SERVICE

I, Albert E. Stephan, Attorney for Inland Petroleum Transportation Company, Inc., one of the appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 14th day of September, 1959 I served copies of foregoing Motion to Affirm on the several parties to this appeal, as follows:

1. On the appellants, by mailing copies in duly addressed envelopes, with first-class airmail postage prepaid, to Bryce Rea, Jr., Esq., Munsey Building, Washington 4, D.C., and by first-class regular mail, postage prepaid, to John M. Hickson, Esqs, Failing Building, Portland, Oregon, and William B. Adams, Esq., 331 Pacific Building, Portland, Oregon.

2. On the United States of America, appellee, by mailing copies, in duly addressed envelopes with first-class airmail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D.C., and John H. D. Wigger, Esq., Anti-Trust Division, Department of Justice, Washington 25, D.C., and by first-class regular mail, postage prepaid, to Clarence E. Luckey, Esq., United States Attorney, U.S. Court House, Portland, Oregon.

3. On the Interstate Commerce Commission, appellee, by mailing copies in duly addressed envelopes, with first-class airmail postage prepaid to Robert W. Ginnane, Esq., General Counsel, and to James Y. Piper, Esq., Assistant General Counsel, Interstate Commerce Commission, Washington 25, D.C.

4. On Everts' Commercial Transport, Inc., appellee, by mailing a copy in duly addressed envelope, with first-class regular mail postage prepaid, to Earle V. White, Esq., 2130 S.W. 5th Avenue, Portland, Oregon.

ALBERT E. STEPHAN

711 Central Building
Seattle 4, Washington

FILE COPY

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JAMES R. BROWNING, Clerk

In the Supreme Court

of the United States

October Term, 1959

No. 337

ST. JOHNS MOTOR EXPRESS CO.,
JAMES J. WILLIAMS, INC., and
CONSOLIDATED FREIGHTWAYS, INC.,

Appellants,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
EVERTS' COMMERCIAL TRANSPORT, INC., and
INLAND PETROLEUM TRANSPORTATION
COMPANY, INC.,

Appellees.

MOTION TO AFFIRM

On Appeal from the United States District Court for the District of Oregon

EARLE V. WHITE,
2130 S. W. Fifth Ave.,
Portland 1, Oregon,
Attorney for Appellee,
Everts' Commercial Transport, Inc.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

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